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Supreme Court of the United States

No. 72-953

MICHAEL O'SHEA AND DOROTHY SPOMER,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-955

W. C. SPOMER,
Petitioner,

vs.

EZELL LITTLETON, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

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BRIEF OF RESPONDENTS.

Respondents, individually and on behalf of the class of persons specified in the amended complaint, file this brief in response to the briefs filed on behalf of the petitioners.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Littleton* v. *Berbling*, 468 F. 2d 389 (7th Cir. 1972). The opinion of the District Court for the Eastern District of Illinois is not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The Petitions for a Writ of Certiorari filed by the two judges and the current state's attorney were granted on April 2, 1973. The Petitions for a Writ of Certiorari filed by the predecessor state's attorney and his investigator, No. 72-1107, have neither been denied nor granted by this Court at this time.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following constitutional and statutory provisions are printed at the end of this brief in the Appendix:

U. S. Const., amend. I, VIII, XIII and XIV
Ill. Const., Art. 1, § 13
28 U. S. C. § 1343
42 U. S. C. §§ 1981, 1982, 1983, 1985
Ill. Rev. Stat., ch. 14 § 1 (1971)
Ill. Rev. Stat., ch. 37 § 72.2 (1971)
Ill. Rev. Stat., ch. 38 § 112-4(a) (1971).

QUESTIONS PRESENTED.

1. Whether the amended complaint adequately states claims for equitable relief under the Civil Rights Act?

2. Whether a federal court has the authority under the Civil Rights Act to enjoin state judges and a state's attorney

from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice?

3. Whether the doctrines of judicial and quasi-judicial immunity bar an action under the Civil Rights Act seeking equitable relief?

STATEMENT OF THE CASE.

Respondents brought this class action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985 (hereinafter referred to as the "Civil Rights Act") and 28 U. S. C. § 1343(3) and (4) individually and on behalf of black persons, and white persons sympathetic to the plight of blacks, from the City of Cairo, Illinois similarly situated, against the petitioners who, as public officials administering criminal justice in Alexander County, systematically discriminate against them and members of their class on the basis of race or creed, interfering thereby with the free exercise of their constitutional rights.[1] The constitutional rights invaded are those guaranteed by the First, Eighth, Thirteenth and Fourteenth Amendments.

Petitioners Dorothy Spomer and Michael O'Shea and W. C. Spomer's predecessor in office filed motions to dismiss the amended complaint.[2] The district court on March 23, 1971 dismissed respondents' claims for injunctive relief for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The Court of Appeals for the Seventh Circuit, on October 6, 1972, reversed the district court's decision and

1. The original complaint was filed on July 23, 1970; the amended complaint was filed on October 23, 1970.

2. The original action was also brought against Peyton Berbling, then State's Attorney for Alexander County, Illinois, and Earl Shepherd, his investigator, for injunctive and other equitable relief and to recover damages. The motion of Berbling and Shepherd to dismiss the amended complaint as to them was sustained by the district court and reversed by the Seventh Circuit. A Petition for a Writ of Certiorari filed by Berbling and Shepherd is pending, unruled upon, before this Court, No. 72-1107.

remanded the case for further proceedings before a different district judge.

The petitioners are: Dorothy Spomer and Michael O'Shea, associate judges of the Circuit Court for Alexander County, and W. C. Spomer, the current state's attorney for Alexander County. W. C. Spomer was not a defendant or appellee below. Upon the expiration of the term of office of his predecessor, Peyton Berbling, who was a defendant and appellee below, W. C. Spomer substituted himself as a party pursuant to Rule 48 of the Rules of the Supreme Court of the United States.

Respondents seek equitable relief against each of the petitioners.

The named respondents, with two exceptions, are black citizens of Cairo. Two respondents are white persons who sympathize with the plight of blacks in Cairo. Respondents are financially poor persons. They filed this action on behalf of themselves and all other persons similarly situated. The class includes all those, including the named respondents, who, on account of their race or creed and because of their exercise of First Amendment rights, have been and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County. (Paragraph 3 of the amended complaint.) The class also includes all those, including the named respondents, who, on account of their poverty, are unable to afford bail or are unable to afford counsel and jury trials in city ordinance violation cases. (Paragraph 4 of the amended complaint.)

The amended complaint alleges that since the early 1960's black persons of the City of Cairo, Illinois have been actively seeking equal opportunity and treatment in employment, housing, education and ordinary day-to-day relations with white persons and officials of Cairo. In furtherance of this equality quest, respondents and members of their class encourage others to engage in an economic boycott of local merchants who prac-

tice racial discrimination. This equality quest generated and continues to generate substantial antagonism from not only the public officials in Cairo but also from local white residents.

Spomer and O'Shea, as judges, intentionally engage in a pattern and practice of racial discrimination[3] against respondents and members of their class as follows: They set bond in criminal cases by following an unofficial bond schedule applicable to black persons without regard to the facts of the case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require black persons, when charged with violations of city ordinances, to pay for a trial by jury, yet do not require other persons to pay for a trial by jury.[4] Each practice is carried out with intent to deprive respondents and the class of the benefits of the criminal justice system and to deter them from engaging in a peaceful boycott and other activities protected by the First Amendment. (Paragraph 34 of the amended complaint, which incorporates by reference paragraphs 1-5 and 10-11, and paragraphs 35-40 of the amended complaint.)

The state's attorney intentionally engages in a pattern and practice of racial discrimination in the exercise of his office against respondents and members of their class by refusing to afford black persons an opportunity to give evidence of criminal conduct committed by white persons against black persons. He refuses to initiate criminal proceedings against white persons arising out of assaults and batteries committed by them against black persons. He refuses to proceed on black persons' com-

3. It is also alleged that their discrimination is based upon economic status. The effect insofar as the right to injunctive relief is concerned is the same as when the discrimination is based upon race. *See Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

4. In Illinois, a defendant has a right to a trial by jury in such cases, even if the penalty is a fine and not a jail sentence. Ill. Const. Art. 1, § 13.

plaints by information. In some instances he declines to interrogate black complainants before a grand jury. In some instances he interrogates black persons before the grand jury in such a manner as to deprive them of their right to give evidence to the grand jury.

Among the examples described in the amended complaint of the above repeated discriminatory conduct by the state's attorney in the exercise of his office are the following:

(1) On March 28, 1969, respondent James Wilson, a black man, complained to the state's attorney that one Charlie Sullivan, a white man, assaulted Wilson with a gun in a threatening manner when Wilson attempted to move his family and household furnishings into a house adjacent to Sullivan on 22nd Street in the City of Cairo. On or about March 29, 1969, Sullivan repeatedly fired gun shots in the vicinity of Wilson's home with the intent to intimidate Wilson's family. The state's attorney, however, refused to permit Wilson to file criminal charges against Sullivan respecting either instance of Sullivan's criminal conduct.

(2) In January, 1970, the state's attorney refused to permit respondent Robert Martin, a black man, to file criminal charges against Charlie Sullivan as a result of Sullivan's attempt to run him down with a truck at a time when Martin was peacefully marching in exercise of his First Amendment rights.

(3) In June, 1970, the state's attorney refused to permit respondent Ezell Littleton, a black man, to file criminal charges against a white man who without cause or justification assaulted and battered Littleton.

(4) In June, 1970, the state's attorney refused to permit respondent, Manker Harris, a white man sympathetic to the effort of Cairo blacks, to file criminal charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(5) On August 10, 1970, the state's attorney, through his investigator Earl Shepherd, refused to permit respondent Hazel James, a black woman, to file criminal charges against one Raymond Hurst, a white man, who kicked her in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and local public officials.

(6) On August 8, 1970, respondent Morris Garrett, a thirteen year old boy was struck by one Tom Madra, a white man, during a demonstration against the racially discriminatory practices of merchants and local public officials. A complaint was filed which the state's attorney presented to the grand jury. The state's attorney, in interrogating Morris Garrett before the grand jury, did not question him concerning the incident of August 8, 1970, but rather asked such questions as "did you get paid for picketing?"

(7) On August 13, 1970, Jack Guetterman, Jr., a white man, fired gun shots in the vicinity of respondents Cheryl Garrett and Yvonda Taylor. Respondents Walter Garrett ("W. Garrett") and Ezell Littleton, following a telephone call from the victims, went to the scene of the shooting. Shortly thereafter, W. Garrett discussed the incident with police officers. During the discussion, Jack Guetterman, Sr., a white man, struck W. Garrett in the face, causing him to fall to the ground. W. Garrett filed a complaint which the state's attorney presented to the grand jury. W. Garrett testified before the grand jury, but was not interrogated by the state's attorney respecting the incident. Littleton, who witnessed the assault, was not called to testify.

(8) On or about August 8, 1970, Al Moss, a white man, struck respondent Curtis Johnson while Johnson demonstrated against the racially discriminatory practices of merchants and local public officials. Johnson filed a complaint which the state's attorney presented to the grand jury. The state's attorney, however, did not interrogate Johnson respecting the incident.

The state's attorney engages in the practice of recommending greater bonds and sentences in cases involving black persons than he does when the case involves white persons. He engages in a practice of bringing significantly more serious charges against black persons for conduct which would result in no charge or a minor charge against white persons.

All of the alleged practices engaged in by the state's attorney are willful and malicious. He intends to deprive respondents of their right to give evidence against those who threaten their security, peace and tranquility and to deprive respondents of their right to hold property to the same extent as is enjoyed by white persons and to deter respondents from engaging in a peaceful boycott and other activities protected by the First Amendment.

SUMMARY OF ARGUMENT.

On a motion to dismiss, the Court must construe the amended complaint liberally, considering all factual allegations to be true. Mere vagueness or lack of detail is not a ground for a motion to dismiss. Complaints need not be verified, but may be signed by an attorney, which signature constitutes his certificate that to the best of his knowledge, information and belief there is good ground to support it.

The Seventh Circuit properly held that the amended complaint states claims upon which relief may be granted. The Civil Rights Act provides a federal remedy which is supplementary to any state remedies. Exhaustion of state remedies is not a prerequisite to relief in the federal courts.

The Civil Rights Act subjects all state officials, including state judges and state's attorneys, to the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination against a class of persons.

The legislative history of the Civil Rights Act clearly indicates an intent to subject judges and state's attorneys to its

command. The conduct of the petitioners is similar to the conduct of state officials subsequent to the Civil War.

The action of petitioners is state action within the meaning of the Fourteenth Amendment and is not immunized from the operation of the Constitution.

Injunctive relief would not constitute an improper intrusion into the operation of the state judiciary or state's attorney. When state officials engage in a systematic pattern of racial discrimination they act outside their judicial and quasi-judicial capacities.

The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of government. To deny respondents equitable relief would strip the Civil Rights Act of its purpose.

ARGUMENT.

The very premise of our constitutional form of government provides the framework within which the issues of these cases must be analyzed. Government exists in delicate balance. In return for fulfilling his duties of citizenship, the citizen is guaranteed certain rights and the equal protection of the law. Courts, legislatures and related legal and public officials exist to protect these rights, to provide forums in which citizens may seek to bring about peaceful change, and to guarantee that the entire system will work. An integral part of peaceful intercourse is the criminal justice system. It is to the courts and quasi-judicial officials that citizens look for the implementation of the criminal justice system.

This society cannot exist as one of law and order if the instrumentalities of the state, particularly those of a criminal nature, are not utilized to benefit all persons irrespective of race. No state official has the authority to determine which laws will be enforced only for white persons and which laws

will be enforced only for black persons. The law must be enforced whether the victim is a black person or white person.

What is charged in these cases involves a fundamental breakdown in the civilized order of local government. Two local judges and the state's attorney are accused of exercising their offices to benefit only persons of the white race. In considering the facts and legal issues presented by this breakdown, it is important to view the circumstances from which this amended complaint arises.

In February, 1973, the United States Commission on Civil Rights published a report entitled "Cairo, Illinois: A Symbol of Racial Polarization." Among other things, the Commission recited the following facts: Extraordinarily grave civil rights problems have long beset the community of Cairo, Illinois. Cairo is a small town with 6,277 residents, 37.5 percent of whom are black according to the 1970 census. The median income for a white family in 1969 was $6,428, the median income for a black family was only $2,809. The unemployment rate for white males in Alexander County, according to the 1970 census, was 6.5 percent while for black males it was 16.2 percent.

In the 1960's there was considerable civil rights activity in Cairo. As a result of this equality quest, considerable tension between black and white citizens was generated. Confrontations were frequent. Gunfire became common and open violence flared. The state government investigated the crisis but failed to take affirmative action to protect the rights of black citizens.

The Commission's report found that the problems of Cairo are exacerbated by state and local governmental agencies who are reluctant to use the authority at their command to compel adherence to civil rights laws.[5] The Commission stated in its judgment:

5. United States Commission on Civil Rights, "Cairo, Illinois: A Symbol of Racial Polarization" (Feb. 1973). This report did not specifically refer to conduct of these petitioners.

> "law enforcement in Cairo has been practiced in a discriminatory and completely unprofessional manner. Basic police services have been arbitrarily denied to certain areas in the black community. Black residents have been faced with serious harassment and physical brutality by law enforcement officials. Police weapons have been used indiscriminately in an attempt to threaten the black community. And local law enforcement officials have aligned themselves with individuals and groups whose purpose is to oppose the enforcement of equal opportunity for all citizens regardless of race." *Id.* at 24.

The Commission said that "a crisis exists in Cairo, because local officials there are not fulfilling their constitutional and statutory responsibilities." *Id.* at 24.

It was against this background, that respondents filed their amended complaint against the petitioners.

I. The amended complaint adequately states claims for equitable relief under the Civil Rights Act.

The Seventh Circuit held that respondents' amended complaint adequately states claims for equitable relief under the Civil Rights Act. This Court, as did the Seventh Circuit, in reviewing the district court's dismissal of respondents' amended complaint, must construe the amended complaint liberally and consider all factual allegations to be true, resolving any doubts in respondents' favor. *See Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *Lucarell* v. *McNair*, 453 F. 2d 836, 838 (6th Cir. 1972); *Scher* v. *Board of Educ. of West Orange*, 424 F. 2d 741, 744 (3rd Cir. 1970).

Mere vagueness or lack of detail is not a ground for a motion to dismiss. Rule 8(f) of the Federal Rules of Civil Procedure

provides that "all pleadings shall be so construed as to do substantial justice." If they thought the amended complaint were vague, petitioners could have moved for a more definite statement, Rule 12(e), F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 12.08 (1972). They did not so move.[6]

Petitioners urge that the amended complaint does not allege that any of the respondents has been a victim of their discrimination. A careful review of the amended complaint, however, refutes their contention, as noted by the court below. Paragraph 1 of the amended complaint states that respondents and members of their class have been deprived by all petitioners of certain enumerated rights guaranteed by the Constitution and laws of the United States. Paragraphs 3 and 4 state that respondents are members of the class on whose behalf the action is brought in addition to having brought the action individually and that because of their race, creed, poverty, and exercise of First Amendment rights they have been and continue to be discriminated against in the administration of criminal justice.

Paragraphs 12-17 and 19-20 state that the state's attorney's conduct deprives respondents of their constitutional rights and describe examples of his discriminatory conduct.

Paragraphs 35 and 36 state that the actions of O'Shea and Spomer, as judges, have deprived and continue to deprive respondents and members of their class of rights guaranteed by the Constitution and laws of the United States. Paragraphs 37 and 38 allege that each of the practices referred to in the amended complaint is carried out with the intent to deprive "plaintiffs and members of their class of the benefit of the

6. That the amended complaint was signed by attorneys rather than by the respondents themselves is irrelevant to a determination of its adequacy to state a claim upon which relief can be granted. Rule 11 of the Federal Rules of Civil Procedure expressly provides that complaints may be signed by attorneys and eliminates as a general rule the need to verify pleadings. The signature of an attorney constitutes a certificate by him that he has read the pleadings and that to the best of his knowledge, information, and belief there is good ground to support it. Rule 11, F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 11.02 (1972).

criminal justice system of Alexander County" and that each of such practices is carried out with the "intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States".

The amended complaint makes two essential allegations: (1) that the conduct complained of was engaged in by the petitioners under color of state law, custom and usage; and (2) that such conduct deprives respondents of rights secured by the Constitution and laws of the United States. *See Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).

Respondents are unable to secure in the courts before Spomer and O'Shea the same enforcement of their rights which is accorded to white citizens. The amended complaint charges that Spomer and O'Shea set higher bonds in criminal cases for black persons than they do for white persons in that they follow an unofficial bond schedule which is utilized when the accused is black. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons charged with the same or equivalent conduct. They require black persons to pay for a trial by jury in certain types of cases. *Compare Griffin* v. *State of Illinois*, 351 U. S. 12 (1956) and *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). By their systematic denial of due process and equal protection of the laws, petitioners seek to chill respondents' exercise of their right to assemble peaceably and to thwart their efforts to remove the shackles of bondage. Such conduct plainly contravenes Section 1981 in that black persons are subject to a different punishment and penalty than white persons and Section 1983 in that black persons are deprived of rights secured by the First, Eighth, Thirteenth and Fourteenth Amendments. Additionally, Section 1982 is contravened in that the imposition of higher bonds and payments for jury trials prevents black persons from holding real and personal property to the same extent as white persons. Respondents thus have properly stated a claim for

equitable relief. *Compare Lane* v. *Correll*, 434 F. 2d 598 (5th Cir. 1970).

Because respondents seek freedom to exercise long-denied constitutional rights by demonstrating against local public officials and merchants on the public ways and seek to exercise everyday rights such as moving into a home, they repeatedly are victims of assaults and batteries committed by white persons. The amended complaint charges that the state's attorney, as the instrumentality of the State, knowing of this criminal violence, makes no effort to bring the guilty to punishment nor to afford protection or redress to the outraged and innocent victims. The state's attorney is unwilling to enforce state criminal laws when the victims are black and the accused are white. He consistently and repeatedly refuses to take evidence of such criminal conduct in that he turns a deaf ear to the complaints of blacks; he refuses to investigate such complaints; he refuses to initiate criminal proceedings against such persons; he refuses to present appropriate evidence before the grand jury, although by statute, the grand jury must hear all such evidence. Ill. Rev. Stat., ch. 38, § 112-4(a) (1971). Immunity has and continues to be given to crime so long as the victim is black or one sympathetic to the injustices and inhumanity to which blacks are subjected. By such conduct, the state's attorney seeks to chill respondents' exercise of their right to assemble peaceably.

This systematic discrimination, because of respondents' race or creed, clearly deprives respondents of due process and equal protection of the laws. The state's attorney's conduct plainly contravenes Section 1981 in that black persons are not permitted to give evidence to the same extent as whites and are deprived of the full and equal benefit of all proceedings affecting their security of person and property. Section 1983 is contravened in that the state's attorney's exercise of his office intimidates respondents from exercising First Amendment rights, denies respondents due process of law and the equal protection of the laws, and deprives respondents of the right to be free

from the vestiges of slavery. The state's attorney's refusal to take evidence to initiate criminal proceedings, for example, against Charlie Sullivan when Sullivan fired gunshots and otherwise intimidated respondent Wilson's family when Wilson moved into a home in a white neighborhood in the City of Cairo, caused Wilson to be deprived of the right to hold real property to the same extent as white citizens in contravention of Section 1982. *Compare Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Additionally, the state's attorney's refusal to recommend bond and sentences without regard to race or creed causes respondents to be deprived of their right to hold real and personal property to the same extent as white citizens in that respondents are required to pay greater sums than whites in posting bond or paying fines.

II. The doctrines of judicial and quasi-judicial immunity do not insulate state judges or state's attorneys from the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination in the administration of criminal justice.

State judges and a state's attorney are not immune from the equitable powers of a federal court when they denigrate their offices by engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice. The civil rights statutes, enacted to implement the Thirteenth and Fourteenth Amendments, express congressional determination to eradicate the vestiges of slavery from American society and to guarantee equal protection of the law to all. They provide a mechanism whereby the federal system may affirmatively intervene when a citizen is deprived of rights guaranteed to all, irrespective of race. *See Bell* v. *Hood*, 327 U. S. 678 (1946); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). Exhaustion of state remedies is not a prerequisite. *McNeese* v. *Board of Educ.*, 373 U. S. 668 (1963); *Carter* v. *Stanton*, 405

U. S. 669 (1972); *Monroe* v. *Pape*, 365 U. S. 167 (1961). No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. *See Dombrowski* v. *Pfister, supra; Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). The fact that the petitioners are two judges and a state's attorney does not relieve them of their fealty to the Constitution and laws of the United States. *United States* v. *McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967); Ill. Rev. Stat., ch. 14, § 1 (1971); Ill. Rev. Stat., ch. 37, § 72.2 (1971). The petitioners stand in this litigation as instrumentalities of the State. *Cooper* v. *Aaron*, 358 U. S. 1, 16-18 (1958); *M. Schandler Bottling Co.* v. *Welch*, 42 F. 561 (Cir. Ct., D. Kan. 1890).

A. The legislative history of the Civil Rights Act reflects a congressional intent that state judges and state's attorneys be subject to its command.

The legislative history of the Civil Rights Act was thoroughly analyzed in the opinion of the Seventh Circuit and will not be repeated here in its entirety. The capricious conduct of these petitioners was precisely that which was sought to be cured by the Thirteenth and Fourteenth Amendments and the Civil Rights Act. Sections 1981 and 1982 were enacted as a means of enforcing the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." The power vested in Congress to enforce this Amendment, therefore, must and does include the power to enact laws of nationwide application. *See Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Griffin* v. *Breckenridge*, 403 U. S. 88, 105 (1971).

Prior to the enactment of Sections 1981 and 1982, Black Codes were adopted throughout the southern states, which, while admitting that Negroes were no longer slaves, nonetheless used the state's power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. One example of the convergence of the history of the Act and the amended complaint herein, is the prohibition by the Black Codes (similar to the conduct of the state's attorney here) of Negroes' testimony in a court against any white man. *See* Senator Wilson's speech before Congress, *Cong. Globe*, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 Fleming, *Documentary History of Reconstruction* 273-312 (1906); McPherson, *The Political History of the United States During the Period of Reconstruction*, 29-44 (1880).

Section 1983 has its roots in Section 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c. 22, § 1, 17 Stat. 13. Its primary purpose was to enforce the Fourteenth Amendment. At the time of its enactment, state and local governments were not controlling the wave of murders and assaults launched against blacks by whites. Section 1 of the Act was designed in response to the unwillingess or inability of the state governments to enforce their own laws against those violating the civil rights of others.[7] The remedy created in § 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 175-76 (1961); *District of Columbia* v. *Carter*, ... U. S. ...., 93 S. Ct. 602, 607 (1973). In the final analysis, § 1 of the 1871 Act may be viewed as an effort

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or other-

7. The Act, moreover, was designed to protect that class of white persons who had Union sympathies. See *Littleton* v. *Berbling*, 468 F. 2d 389, 400 (7th Cir. 1972). Similarly, here, respondents charge that petitioners discriminate against a class of white persons who sympathize with the plight of blacks in Cairo.

> wise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961).

Respondents' cause of action against Spomer and O'Shea prays for equitable relief. All that is asked is that these two petitioners be directed to set bond in criminal cases, to impose criminal sentences, and to provide trials by jury in all cases in a nondiscriminatory manner without regard to race or creed.

The discriminatory conduct of Spomer and O'Shea is precisely the kind of conduct against which the Civil Rights Act is directed. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape, supra,* Mr. Burchard of the State of Illinois said:

> "[I]f the [state's] statutes show no discrimination, *yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another,* or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, *the State has not afforded to all its citizens the equal protection of the laws."* (Emphasis added.) *Id.* at 176-77.

With respect to the state's attorney, respondents charge that he refuses to permit them to give evidence of criminal conduct of white persons against black victims, to initiate criminal proceedings against white persons who commit criminal conduct against them, to present evidence to the grand jury and to recommend bond and sentences in a nondiscriminatory manner without regard to race or creed.

The framers of the Civil Rights Act recognized that the agents of the State charged with the responsibility for prosecuting the criminally accused on behalf of the people might be derelict in

their duties when the victims were black and therefore designed the Civil Rights Act to rectify such an evil. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961), Senator Sherman of Ohio said:

> ". . . it is said that the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify." *Id.* at 173-74.

This Court, moreover, stated that the purposes of the Civil Rights Act were broad—that the aim

> "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."
>
> ". . . It was not the unavailability of state remedies but the *failure of certain States to enforce the laws with an equal hand* that furnished the powerful momentum behind this 'force bill.' (Emphasis added.) Mr. Lowe of Kansas said:
>
> > 'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.'
>
> "Mr. Beatty of Ohio summarized in the House the case for the bill when he said:
>
> > '. . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged,

> and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.' " *Id.* at 174-75.

This Court continued:

> "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."
>
> * * * * *
>
> "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." *Id.* at 175-76.

B. Decisions of this Court hold that no state official, in the exercise of his office, may discriminate on the basis of race against a class of persons.

Action of state courts and quasi-judicial officers in their official capacities has long been regarded as state action within the meaning of the Fourteenth Amendment and subject to the equitable powers of the federal courts. State judicial and quasi-judicial action is not immunized from the operation of the Constitution and Civil Rights Act simply because it is that of the judicial or executive branches of the state government. *See Shelley* v. *Kraemer,* 334 U. S. 1 (1948) and cases discussed therein by Mr. Justice Vinson; *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Indeed, in 1880 this Court stated in *Ex parte Virginia,* 100 U. S. 339, 25 L. Ed. 676, 679 (1880):

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public

> position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Id.*

In *Mitchum* v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151, 2160-62 (1972), this Court stated that the Civil Rights Act fundamentally altered the federal system. As a result of the constitutional amendments and statutes passed subsequent to the Civil War,

> "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
>
> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or *judicial*.' " (Emphasis in original.)
>
> . . .
>
> "[C]ongress plainly authorized the federal courts to issue injunctions."

In *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), this Court stated:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by *state legislators or state executives or judicial officers*, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' " (Emphasis added.)

The Seventh Circuit decision in the present case is consistent with decisions of the Fifth Circuit, which has grappled, perhaps, more than most circuits with the problems of discriminatory conduct of state officials. *E.g.*, *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969); *Shaw* v. *Garrison*, 467 F. 2d 113 (5th Cir. 1972); *Sheridan* v. *Garrison*, 415 F. 2d 699 (5th Cir. 1969), *cert. denied*, 396 U. S. 1040 (1970); *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson*, 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969).

The decision of the Seventh Circuit is not in conflict with this Court's decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967). In *Pierson*, the Court was concerned with an action for damages, not one for equitable relief, against a state judge. Moreover, the record in *Pierson*, unlike here, was "barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners when their cases came before this Court." *Id.* 553. In the subject case it is alleged that the petitioners are engaging in a pattern and practice of racial discrimination and that they are not merely exercising discretion within the bounds of the Constitution and laws of the United States.

Petitioners' reliance upon *Bradley* v. *Fisher*, 80 U. S. (13 Wall.) 335 (1872), is misplaced. *Bradley* was a common law action for damages by an attorney whose name was stricken from the role of attorneys as a result of remarks he made in the course of a trial. It was not an action in equity; it was not an action under the Civil Rights Act; it was not a case where the judge systematically engaged in a pattern and practice of racial discrimination against an entire class of persons. Petitioners, however, argue that the sanctions of contempt are as dangerous to judicial independence as the risk of a suit for damages. That argument assumes that the petitioners will defy an order of a federal court not to discriminate in the exercise of public office upon the basis of race. If that assumption were valid, then such would be all the more reason for the intervention of a federal court to protect the rights of citizens.

Tenney v. *Brandhove*, 341 U. S. 367 (1951), reversing 183 F. 2d 121 (9th Cir. 1950), does not stand for the principle that state legislators, and by analogy state judges and state's attorneys, are immune from the equitable powers of the federal courts when such persons engage in a systematic pattern and practice of racial discrimination against black persons. *Compare Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). *Tenney* was an action to recover damages for alleged civil rights violations against a single individual; equitable relief was not sought. That decision, moreover, expressly limited itself to the facts of that case. The Court stated:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character for which the members who take part in the act may be held responsible." *Id.* at 378-79.

Subsequent to *Tenney*, this Court, in, for example, reapportionment and voting rights cases, has clearly established that such officials may be enjoined from racially discriminatory conduct, and, indeed, be required to rectify affirmatively the wrong caused by their conduct. *E.g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *United States* v. *Raines*, 362 U. S. 17 (1960); *Baker* v. *Carr*, 369 U. S. 186 (1962). *See also Jordan* v. *Hutcheson*, 323 F. 2d 597, 601-02 (4th Cir. 1963) and cases cited therein.

This is not a case in which injunctive relief would constitute an unwarranted intrusion into the operation of the state judiciary or office of state's attorney. A federal district court is not being asked merely to substitute its judgment for the judgment of state judges and a state's attorney arising out of discretionary action in an isolated case by a disgruntled litigant. A federal district court is not being asked to enjoin pending state criminal prosecutions. Rather, because the petitioners, as judges and as a state's attorney, abuse their official positions to engage systematically in a pattern of discrimination whereby persons because of their race or creed are treated in a manner different from others, a federal

court is being asked to intervene. Federal respect for state institutions does not provide a shield for such pervasive invasions of citizens' constitutional rights. *Compare Jordan* v. *Hutcheson*, 323 F. 2d 597 (4th Cir. 1963).

C. Petitioners' contentions that a federal court should not infringe upon the discretion of state judges and state's attorneys are inapplicable to the circumstances of this case.

When state officials pervert their office by acting in a fashion in violation of the Constitution and laws of the United States, they have acted outside their judicial and quasi-judicial capacities and may be enjoined by a federal court. The exclusion of black persons from the benefits of citizenship is not within the limits of their discretion. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151-2 (1970); *Ex parte Virginia*, 100 U. S. 339 (1880). As Judge Pell stated for the court below:

> "The word discretion is limited by the duty to follow the law and such a blanket pattern of discrimination as is here alleged cannot be said to conform to such a duty. A discretionary action is subject to review and reversal for abuse of discretion. 'And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable.' *United States* v. *McWilliams*, 163 F. 2d 695, 697 (D. C. Cir. 1947). For us to find that the acts and failures to act alleged in the complaint do not constitute an abuse of discretion, we would have to say that they do not constitute 'arbitrary action.' *Burns* v. *United States*, 287 U. S. 216, 223 (1932), and this we can only do by ignoring the mandates of equal protection of the laws." *Littleton* v. *Berbling*, 468 F. 2d 389, 412 (7th Cir. 1972).

In *Osborn* v. *Bank of the United States*, 22 U. S. (9 Wheat.) 738, 866 (1824), Chief Justice Marshall stated:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is

> discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." (Emphasis added.)

The allegations relating to the conduct of the state's attorney do not relate to that prosecutorial discretion which would apply to an individual case. The state's attorney is charged with refusing to take complaints from black persons, with refusing to investigate criminal conduct of whites against blacks, with refusing to present evidence of such criminal conduct to the grand jury, and with refusing to recommend bail and sentence without regard to race. When he thereby deprives respondents of the opportunity of access to the judicial system, he stands in no different a position than the prison warden who deprives a prisoner access to the courts or the police officer who unlawfully carries out an investigation. *Compare Johnson* v. *Avery*, 393 U. S. 483 (1969); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966); *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (7th Cir. 1969); *Lewis* v. *Kugler*, 446 F. 2d 1343 (3rd Cir. 1971).

Petitioners argue that there are alternative remedies so preferable to equitable relief that this action should be dismissed. They argue that an action for damages is preferable. *Pierson* v. *Ray*, 386 U. S. 547 (1967), however, precludes an action for damages against state judges. Petitioner W. C. Spomer, the current state's attorney, suggests that an action in damages against a state's attorney is preferable to equitable relief. The Seventh Circuit, however, held that only when a state's attorney improperly exercises his investigatory functions may an action for damages be brought. This Court, moreover, has never decided that question. Indeed, the issue raised in *Berbling* v. *Littleton*, No. 72-1107, pending before this Court is whether or not an action for damages may be brought against a state's attorney. Spomer's predecessor in that petition argues that one

may not be brought. An action at law, moreover, is plainly inadequate where respondents suffer continuous deprivation of their rights. The possibility of piecemeal after-the-fact damage suits will not necessarily deter the type of discrimination alleged here. In addition, undue burdens would be imposed upon the district court to decide multiple lawsuits.

Nor is the ballot box adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Cairo, Illinois, has admittedly been the scene of substantial civil rights agitation for the last several years. Not surprisingly there has been a polarization of the community, and, in such a case, it would be totally presumptuous of this court to find that the ballot provides even a probability of remedying the alleged oppression of the minority by the duly elected representatives of the majority. It was, in fact, just such oppression which caused the Congress to enact the provisions with which we now deal."

The remedy of criminal prosecution of petitioners for their misconduct is not adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant police officer, the errant prosecutor, and never the oppressive judge. The civil damage suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character." Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 434 (1960).

There is no private enforcement of criminal laws in Illinois.

The amended complaint meets not only the standards for federal involvement under *Mitchum* v. *Foster*, 407 U. S. 225 (1972), but also those espoused in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its companion cases. *See also Hadnott* v. *Amos*, 393 U. S. 815 (1968) and *Hadnott* v. *Amos*, 394 U. S. 358 (1969).

That the federal courts may require state officials to take affirmative action, if necessary, is not without precedent. *See Louisiana* v. *United States*, 380 U. S. 145 (1965); *Reynolds* v. *Sims*, 377 U. S. 533 (1964). This is most emphatically reflected in school desegregation cases. As a result of *Brown II*, the State automatically assumed an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown* v. *Board of Educ.*, 349 U. S. 294, 301 (1955); *see also Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1, 15 (1971). *Brown II* did not merely prohibit discrimination. The type of relief sought here would not require, however, reallocation of state resources, restructuring of political boundaries or the construction of new facilities as required in those cases. *See, e.g., Keyes* v. *School District No. 1, Denver, Colo.*, ... U. S. ...., 41 U. S. L. W. 5002, 5009, 5017 (June 21, 1973). The relief suggested by the Seventh Circuit, assuming respondents prove their charges, is more in the nature of a reporting system to assure that racial discrimination is not pervasive in the administration of criminal justice. *Compare Louisiana* v. *United States*, 380 U. S. 145 (1965).

In sum, courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to black and white, to rich and poor. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to blacks or indigents altogether. Where race determines whether criminal conduct shall be punished or money determines the kind of a trial a man gets or race determines whether he gets into court at all, the great principle of equal protection becomes a mockery.

CONCLUSION.

For the foregoing reasons, respondents urge the Court to affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U. S. Const. amend. XIII:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend. XIV.

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U. S. C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985:

§ 1985(2) ". . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Ill. Const., Art. 1, § 13:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Ill. Rev. Stat., ch. 14 § 1:

Before entering upon the respective duties of their office, the attorney general and state's attorneys shall each be commissioned by the governor, and shall take the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general (or state's attorney, as the case may be), according to the best of my ability.

Ill. Rev. Stat., ch. 37 § 72.2:

. . . The several judges of the circuit courts of this State, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation, which shall be filed in the office of the Secretary of State:

I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of judge of ..... court, according to the best of my ability.

Ill. Rev. Stat., ch. 38 § 112-4(a):

The Grand Jury shall hear all evidence presented by the State's Attorney.